[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-14738

D.C. Docket No. 01-01271-CV-ORL-19

CLAYTON HOSPITALITY GROUP, INC., a Florida corporation,

Plaintiff-Appellant,

versus

ORANGE COUNTY, a political subdivision of the State of Florida, EARL K. WOOD, in his official capacity as Orange County Tax Collector,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

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(May 12, 2003)

Before MARCUS, WILSON, Circuit Judges, and RESTANI*, Judge.

PER CURIAM:

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*Honorable Jane A. Restani, Judge, United States Court of international Trade, sitting by designation.

Plaintiff-Appellant Clayton Hospitality Group, Inc. ("Clayton") appeals the district court's order granting summary judgment to Orange County, Florida and Earl K. Wood, as Orange County Tax Collector ("Defendants") in Clayton's amended complaint, filed pursuant to 42U.S.C. § 1983. In its amended complaint, Clayton raised a facial challenge to the constitutional validity of the license-transfer provisions contained in Orange County's Adult Entertainment Code ("AEC"). Clayton contends that the license-transfer provisions are a prior restraint on free expression that give public officials "unbridled" discretion and that do not include the procedural safeguards mandated in *Freedman v. Maryland*, 85 S.Ct. 734,737-39 (1965). No reversible error has been shown; we affirm.

Gerald Uranick, as President of Clayton, purchased from InnCon American, Inc. ("InnCon"), the adult entertainment license, and the trade name for the adult entertainment business known as "Diamond Club" in Orange County, Florida. Uranick, on behalf of Clayton, then filed an application with the Occupational License Department of the Orange County Tax Collector for a transfer of the adult entertainment license from InnCon to Clayton. Defendants denied Clayton's first transfer application but granted Clayton's second application as a result of Clayton correctng various building-code violations.

After Clayton's first transfer application was denied but before its second transfer application was approved, Clayton filed a complaint raising both facial and "as applied" constitutional challenges. Clayton amended his complaint following Defendants' approval of his second application, thereby deleting his "as applied" challenge. Clayton sought, among other things, a judgment declaring

the transfer provisions – requiring a building inspection – unconstitutional and an injunction permanently enjoining Defendants from enforcing these provisions. Both parties conducted discovery and filed motions for summary judgment, pursuant to Fed.RCiv.P. 56(c). The district court, finding that the contested license-transfer provisions were constitutional on their face, granted Defendants' motion for summary judgment and denied Clayton's motion.

As a preliminary matter, we must determine whether we have jurisdiction to review Clayton's constitutional challenge. See *Morrison v. Allstate Indem. Co.*, 228 F. 3d 1255, 1261(11th Cir. 2000) (federal courts have an obligation to inquire into jurisdiction whenever it may be lacking). As discussed above, Defendants granted Clayton's second application for a license after Clayton corrected various building-code violations. But when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or to deny expressive activity, a person who is subject to the law may challenge it facially without first applying for, and being denied, a license. *City of Lakewood v. Plain Dealer Publ'g Co.*, 108 S.Ct. 2138, 2143 (1988).

We review a summary judgment ruling *de novo*, applying the same legal standards used by the district court. *Johnson v. Board of Regents of Univ. of Georgia*, 263 F.3d 1234, 1242 (11th Cir. 2001). The constitutionality of a statute is a question of law subject to *de novo* review. *Ranch House, Inc. v. Amerson*, 238 F.3d 1273, 1277 (11th Cir. 2001). Although a person raising a facial challenge to a statute generally must establish that no set of circumstances exists upon which the .application of the statute would be valid, we permit facial challenges to prior

restraints on speech without requiring the plaintiff to make such a showing. *United States v. Frandsen*, 212 F.3d 1231, 1235-37 (11th Cir. 2000).

A prior restraint on expression exists when the government can deny access to a forum for expression before the expression occurs. *Ward v. Rock Against Racism*, 109 S.Ct. 2746, 2756 n.5 (1989). Prior restraints are not unconstitutional *per se*. *FW/PBS, Inc. v. City of Dallas*, 110 S.Ct. 596, 604 (1990). But a system of prior restraint "comes to this Court bearing a heavy presumption against its constitutional validity." *Id.*

As a form of prior restraint, licensing schemes commonly contain two defects: discretion and the opportunity for delay. *Lady J. Lingerie. Inc. v. City of Jacksonville*, 176 F.3d 1358, 1361 (11th Cir. 1999), *cert. denied*, 120 S.Ct. 1554(2000). Statutes, as such, may not give public officials "unbridled" discretion to deny persons permission to engage in constitutionally protected expression. *Id.* at 1362. And a licensing ordinance must contain, at a minimum, the latter two procedural safeguards from *Freedman*, that is, specified brief time limits on the decisionmaker and prompt judicial review. *Redner v. Dean*, 29 F.3d 1495, 1500 (11th Cir. 1994) (citing to the plurality in *FW/ PBS*, 110 S.Ct. at 606-07, 611).

The license ordinance at issue here, the AEC, licenses and regulates adult entertainment businesses in

Orange County, Florida.[1] Section 3-26 of the AEC provides that no adult entertainment establishment may operate without having first been granted an adult entertainment license by the Tax Collector. *See* AEC § 3-26. Section 3-33 of the AEC allows for the transfer of an existing adult entertainment license for an existing adult entertainment establishment. *See generally*, AEC § 3-33. Upon receipt of a properly filed transfer application, the Tax Collector must "immediately . . . send photocopies of the application to the sheriff, the building department, the fire rescue services division, the health department, and the zoning department." *See* AEC § 3-28(a). Each of these departments then must "promptly conduct an investigation of the applicant, application and the proposed establishment in accordance with its responsibilities summarized in section 3-9 of this chapter." *See* AEC § 3-28(b); *see also* AEC § 3-9(2) – (6) (summarizing the inspection duties of the departments listed in § 3-28).

The AEC further provides that each department, after completing its investigation, must prepare and forward to the Tax Collector a report stating whether the department found a violation of the applicable statutes, codes, or ordinances. *See* AEC § 3-28(c). The Tax Collector must grant or deny an application, dependent

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[1] As the district court noted, neither party disputes that the adult entertainment regulated by the AEC constitutes expression protected under the First Amendment. Defendants do challenge whether the AEC license-transfer provisions constitute a prior restraint because these provisions do not prevent a new owner or operator who has applied for a license transfer from managing the adult entertainment establishment before the transfer is approved. We will assume for purposes of this appeal, however, that these provisions constitute a prior restraint.

upon the department recommendations, within 30 days from the date of its proper filing and must notify the applicant within 7 days of the decision. *See* AEC § 3-29(a)(1). If none of the departments has made a finding within 30 days that would require denial of the license transfer, the Tax Collector must grant the application. *See* AEC § 3-29(b). If the application is denied, an applicant may submit another application upon payment of the required fee. *See* AEC § 3-19(d). And the Tax Collector's decisions "may be immediately reviewed as a matter of right by a court of competent jurisdiction upon the filing of an appropriate pleading by an aggrieved party." *See* AEC § 3-10.

Clayton first contends that the license-transfer provisions in the AEC constitute an unconstitutional prior restraint because they give Defendants "unbridled" discretion to deny transfers. Citing to *Miami Herald Publishing Co. v. City of Hallandale*, 734 F.2d 666 (11th Cir. 1984), Clayton asserts that, similar to the unconstitutional provisions in *Miami Herald*, the licensing provisions here improperly grant inspectors the discretion to determine which codes, statutes, ordinances, and regulations to apply in deciding whether the building is "in compliance." Clayton also argues that, by conducting inspections separate from the licensing process, Defendants still could accomplish their goals of protecting the public health and safety without infringing on the First Amendment rights of transfer applicants.

Statutes may not give public officials "unbridled" discretion to deny persons permission to engage in constitutionally protected expression. *City of Lakewood*, 108 S.Ct. at 2144. We have interpreted this principle as implying that some measure of discretion is acceptable,

but that standards must be precise and objective, with amounts of discretion beyond the "mere ministerial" suspect. *Lady J. Lingerie*, 176 F.3d at 1362. Applying these principles, we determined that the ordinance in Miami Herald – allowing the city commission to deny a license if it found any violation of any provision of the entire city code – gave city officials too much discretion and was, as such, facially unconstitutional. *Miami Herald*, 734 F.2d at 674–75; *see also Lady J. Lingerie*, 176 F.3d at 1362 (ordinance impermissibly set out general criteria that were neither precise nor objective).

On the other hand, the AEC's license-transfer provisions do not give officials "unbridled" discretion in recommending whether or not the Tax Collector should grant or deny an application. The AEC specifies which provisions of the Orange County Code are applicable by directing that applicable administration departments must inspect for violations of building, zoning, fire, and health ordinances or codes. *See* AEC § 3-9. Unlike the ordinance in *Miami Herald*, the licensing provisions in the AEC dictate that each administrative department charged with the responsibility of enforcing specific codes, rather than a voting or political body such as a county commission, must make the decision.[2] The standards set out in the AEC for transferring licenses, as such, are ministerial and do not impermissibly give each applicable administrative department "unbridled" discretion. *Lady J. Lingerie*, 176 F.3d at 1362.

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[2] *Miami Herald* also is distinguishable because, as discussed below, the AEC prescribes a reasonably brief time within which the Tax Collector must decide whether to grant or deny a transfer application and furnishes access to prompt judicial review. Cf. *Miami Herald*, 734 F.2d at 675-76 (ordinance provided neither time limits for license decisions nor means for prompt judicial review).

In addition to challenging the amount of discretion contained in the AEC's license-transfer provisions, Clayton challenges the amount of time Defendants are allowed in deciding whether to grant or deny transfers. Clayton concedes that § 3-29 appears to require final action on a transfer application within 30 days, but contends that this time limit is illusory in practice because Defendants may continue denying a person's applications by finding a different minor violation each time an application is filed. In a facial constitutional challenge, however, we are to analyze a statute as it is written; the facts of the challenging party's case are not critical. *See Miami Herald*, 734 F.2d at 674 n.4.

As written, if none of the applicable departments have made a finding that an application should be denied, the Tax Collector must grant the license transfer within 30 days of receipt. *See* AEC § 3-29(b). The AEC, as such, requires the Tax Collector to act within 30 days from the date the application is filed, regardless of whether the applicable departments have conducted their respective inspections. And we have determined that this 30-day time limit provides a satisfactory procedural safeguard as required by *Freedman*. *See Redner*, 29 F.3d at 1500 (45-day time limit reasonable).

Because the license-transfer provisions in the AEC neither give government officials "unbridled" discretion to deny applicants permission to engage in constitutionally protected expression nor deny applicants the procedural safeguards guaranteed in *Freedman*, the district court did not err in granting Defendants' motion for summary

judgment.[3]

AFFIRMED.

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[3] Clayton also argues for purposes of preserving the record, that the license-transfer provisions in the AEC are unconstitutional because they do not require courts to grant prompt judicial review. Defendants respond that, despite that the record excerpts contain a document labeled "First Amended Complaint," which includes this argument, the record only contains a document entitled "Amended Complaint," in which Clayton abandoned this argument A review of the record has not revealed a document labeled "First Amended Complaint." Nevertheless, we have determined that "access to prompt judicial review [as opposed to prompt judicial resolution] is sufficient for adult entertainment licensing ordinances." *See Boss Capital, Inc. v. City of Casselberry*. 187 F.3d 1251, 1256-57 (11th Cir. 1999), *cert. denied*, 120 S.Ct. 1423 (2000).